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Regulatory framework

As a member of the European Union, Hungarian competition rules comprise both EC and domestic competition rules. The most important source of domestic competition rules is Act LVII of 1996 on the Prohibition of Unfair Market Behaviour and the Restriction of Competition (the Act).

The Act's rules regarding the restriction of competition regulate the prohibition of agreements restraining competition (both horizontal – that is, cartels – and vertical restraints), the prohibition of abuse of dominance and merger control. Regarding the prohibition of horizontal and vertical restraints, the domestic Hungarian rules are based on article 101 of the Treaty on the Functioning of the European Union (TFEU) and the secondary EC legislation and practice in relation thereto, while article 102 has a Hungarian domestic counterpart in the Act's rules concerning the prohibition of abuse of dominance. The ECMR (both the previous and the current) provided the basis for the Act's provisions on domestic merger control, which became fully harmonised with the current ECMR with the amendment of the Act introducing the SIEC test into Hungarian law from 1 June 2009.

In addition to the above, there are numerous government decrees in effect providing block exemptions regarding the prohibition of horizontal and vertical restraints in relation to certain types of agreement, such as the block exemptions in relation to certain insurance agreements, motor vehicle distribution agreements, technology transfer agreements, specialisation agreements, research and development agreements and vertical agreements.

Furthermore, the Hungarian Competition Authority (HCA), within the framework of its regulatory role and that of developing a competition culture in Hungary, has issued several pieces of 'soft law', namely legal instruments that are not binding on the courts, but that provide guidance on the HCA's interpretation of the Act. These include:

- the HCA's Principal Guidelines on the application of the Act, the latest actualised and compiled set of which was issued in 2009 by the HCA, and which are based on the HCA's practice regarding particular cases, but are communicated as principles intended to be followed by the HCA in similar cases in future (thus, the Principal Guidelines may provide grounds for the development of case law in the field of domestic competition law);
- the Notice and related Guidelines of the head of the HCA in relation to the differentiation of first and second-phase cases in merger control procedures (which were reissued in line with the amended regulatory framework in 2009); the HCA's leniency policy (which remains applicable only with regard to applications filed by 31 May 2009, with the Act containing the relevant rules applicable from 1 June 2009);
- a Notice on remedies in merger control cases and a Notice regarding the assessment of fines in cases involving the undue influencing of the decision making of consumers; and
- the HCA provides a general policy framework in relation to its activities, meaning its regulatory role as well as its role in the enhancement of competition and a competition culture, because of which two General Policy Guidelines were published in May 2007 by the HCA: one on ensuring freedom of competition and the other on ensuring freedom of consumer choice, the latter of which was reissued at the beginning of 2010.

Besides the above core domestic competition legislation, further rules regarding the regulation of competition can be found in sectoral legislation such as the telecommunication rules, the rules regarding public utility services, etc. Finally, since 1 September 2005, the Hungarian Criminal Code (1978) has also contained very important rules regarding competition, as certain cartels may induce the application of criminal penalties against both the natural and legal person participants.

In addition to the above, the HCA, as a member of the ECN, applies EC competition law in cases falling within the scope of articles 101 and 102 of the TFEU.

Horizontal and vertical restraints

The most recent important change in this field concerning the assessment of restraints is the amendment of the Act, effective as of 1 November 2005. Amendments of the Act since this date have incorporated the HCA's leniency policy into the framework of the Act and introduced the so-called informant reward programme, which makes it possible to reward persons providing key information on hard-core cartels. The following is a summary of the Act effective as of 1 November 2005:

- The basic prohibition of horizontal and vertical restraints of competition was not altered by any of the recent amendments of the Act: briefly, agreements and concerted practices, and decisions of associations of undertakings that may have as their object or effect the prevention, restriction or distortion of competition, are prohibited, with special regard to, for example, market sharing, price fixing, etc, and any agreement falling within the scope of this prohibition will be invalid.
- There may, however, be agreements that do not per se fall within the scope of the above restriction (eg, certain forms of franchise and selective distribution agreements, in line with the practice of the ECJ adopted by the HCA).
- Agreements between related parties, a similar notion to a single economic unit, per se fall outside the scope of the above restriction: as of 1 November 2005, 'related parties' are those undertakings that belong to the same group of undertakings as defined by the Act.
- Agreements of minor importance fall outside the scope of the general prohibition; however, the de minimis threshold both in relation to horizontal and vertical agreements is a 10 per cent market share, while the exceptions regarding the de minimis threshold are only concerned with hard-core horizontal restraints such as market sharing and price fixing (and network effects may also remove the agreement from the scope of minor importance).
- If the agreement concerned falls within the scope of the basic prohibition set forth above, it may still be exempted either via an

available block exemption or an individual exemption. The system of notifying agreements for an individual exemption or for a negative clearance was abolished as of 14 July 2005; therefore the parties themselves, similarly to article 101(3) of the TFEU, should assess whether the four conjunctive conditions for the applicability of an individual exemption are met.

- The original form of the recent amendment of the Act that was sent to the Constitutional Court by the Hungarian President for preliminary review in 2008 prescribed a special, objective sanction in respect of executive officers of companies found to have participated in hard-core cartels and fined for this: an executive officer – who was in such a position at the time of the infringement – would have been (basically on an automatic basis) barred from fulfilling the position of an executive officer in any company for two years, and an exemption from such sanction could have been granted only upon appeal. This type of regulation was found to be unconstitutional by the Constitutional Court and therefore the final, effective form of the amendment of the Act omitted this type of sanction.

In addition to the above, as of 1 September 2005, section 296/B of the Criminal Code (1978) establishes a crime punishable with imprisonment of up to five years for any person who, to influence the result of either an open or closed tender in relation to either a public procurement procedure or a concession activity, concludes an agreement regarding the fixing of prices (fees) and other contractual conditions, or regarding market sharing, or commits other concerted practices, and therefore restricts competition. In addition, the same provision is applicable regarding a person who commits the above crime as a member of an association of undertakings. A person may be exempted, however, from criminal liability provided that he or she reports the crime to the public authorities before they gain knowledge thereof, and divulges the circumstances of the crime. The notion of 'public authority' means not only criminal prosecutors, but also the HCA, the financial supervisory authority and the public procurement supervisory authority.

The wording of section 296/B apparently differs from that of section 11 of the Act and article 101 of the TFEU (ie, there is slight confusion regarding the notions of agreement and concerted practice in the wording of the Criminal Code). But, according to the reasoning of the bill in relation to section 296/B of the Criminal Code, the content of the section was provided by the substantive competition rules. Furthermore, a 'person' within the meaning of the section is any natural person representing the undertaking, which encompasses not only any executive thereof, but also any employee, etc, who participates in the crime. Nevertheless, this does not mean that the participating undertakings cannot be punished under criminal law via their executives, employees, etc; namely, Act CIV of 2001 on Sanctions Against Legal Persons seems to be applicable in relation to section 296/B of the Criminal Code.

The parallel applicability of the 'traditional' provisions of the Act and the recently enacted criminal penalty raises certain practical issues, mainly in respect of the HCA's leniency policy and the possibility to grant an exemption from criminal law liability, which the HCA realised in 2006 (see the following section).

HCA's leniency policy and informant reward programme

Alongside the path the European Commission opened regarding the introduction of a leniency programme with respect to cartels, the HCA introduced its own leniency programme regarding cartels in 2003. The 2003 Notice on the HCA's whistle-blower policy points out that in exchange for cooperation by an undertaking participating in a cartel regarding the discovery and termination thereof, the HCA may, depending on the level and nature of the cooperation, either grant a full cancellation of fines or a reduction thereof.

The 2003 Notice was amended in February 2006 due to the fact that, as noted above, certain types of cartels qualify as criminal offences, and the leniency policy had to be brought into line with this novelty. The 2006 Altered Notice therefore referred to the fact that separate guidelines would be issued regarding this matter.

As of 1 June 2009, the leniency policy rules were incorporated – with slight modifications – into the Act, and therefore became binding on the HCA and enforceable by the courts. This amendment was also in line with the model leniency programme of the European Competition Network (ECN), which requires a higher level of legal certainty. The new leniency rules in the Act contain the following principles (practically maintaining the principles that were already applied via the relevant Notice, as outlined above): there is a possibility for a full exemption from or a reduction of the fine, depending on the rank the reporting entity obtains via its report, with the caveat that only the first reporting entity providing unknown and conclusive evidence can avail itself of a full exemption. In addition, the size of the reduction may be from 30 per cent up to 50 per cent; from 20 per cent up to 30 per cent; and up to 20 per cent, depending on the rank that the reporting entity obtains. It is also possible to submit either a preliminary or a non-final report.

The guidelines referred to above were published in February 2006, and aim at harmonising the application of the conditions for exempting criminal liability and the consequences imposed by the Act. These guidelines remain applicable after the recent amendment of the Act.

In brief, the guidelines make it clear that fines based on the Act are applicable only against an undertaking, but criminal sanctions may be applicable regarding both the persons participating in the cartel (meaning not only members of the management, but also employees) and the undertaking itself. Furthermore, it is also pointed out that an application for leniency has to be submitted to the HCA, whereas an exemption from criminal liability may be granted by the courts if the recipient of the report on the cartel is a public authority (including the HCA, but also meaning, for example, the criminal authorities, the public procurement supervisory authority, etc).

Based on the above, the guidelines point out that:

- the first reporting of a cartel to a public authority other than the HCA may provide grounds for exemption from criminal liability, but the availability of leniency is unlikely since the HCA is likely to learn about the existence of the cartel from the public authority to which the report was made earlier than the receipt of a report from the undertaking;
- as far as the reverse situation is concerned, that is, first reporting the cartel only to the HCA, this may provide grounds for a cancellation of fines, but it may not guarantee an exemption from criminal liability;
- multiple reporting (ie, made jointly by more than one participant) in the HCA's leniency policy is excluded, and the same situation may be applicable in the criminal procedure; and
- the HCA will accept a report only from the representatives of the participating undertaking, whereas they will not necessarily be the same persons who actually bear criminal liability for the cartel; therefore, it is advisable that the persons who are affected by the cartel institute a parallel procedure requesting criminal exemption.

As of 1 April 2010 an Amendment of the Act introduced a new tool – existing only in one other EU member state, the UK – in the fight against cartels, the informant reward programme, whose aim is to encourage private persons to report price-fixing or market-partitioning cartels and cartels whose participants intend to stipulate production or sales quotas (ie, hard-core cartels). The programme is perhaps an indirect acknowledgment that the introduction of the leniency policy and its later incorporation into the Act did not bring the desired result of breaking hard-core cartels in Hungary.

According to the new rules, any natural person who has knowledge of a hard-core cartel and provides the HCA with essential written evidence on such infringement in secret will receive an informant's reward amounting to 1 per cent of the fine levied against the participants in the cartel, but in no case more than 50 million forints. The identity of the reporting person is to be kept secret upon request, but such request may deprive the evidence of its essential character. Multiple reporting is possible in this case; each person meeting the requirements becomes entitled to the full amount of the reward, provided that the informants did not share the evidence in question among themselves in order to multiply the reward. In the latter case one single reward will be divided into equal shares. Parallel application of the leniency policy and the informant reward programme is excluded, for example, if one of the representatives of the participants in the cartel requests leniency, he or she will not be entitled to an informant's reward. Evidence obtained through the means of an established crime or misdemeanour will not entitle its provider to a reward, and any dispersed reward in such a case must be repaid. If the criminal proceedings are initiated before payment, the payment will be suspended until the proceedings have been concluded.

Recent developments in the HCA's practice

A recent decision of the HCA established a new record in the amount of fines levied in cartel cases: fines totalling 7.178 billion forints were imposed on 9 June 2010 for hard-core cartel activities in a public hearing of the Competition Council of the HCA. The cartel was established to share the market of public procurement tenders to be called by the Hungarian state-owned railway company in the years 2004 and 2005 for railway maintenance throughout Hungary. Four undertakings were fined, while the fifth was exempted from the fines within the framework of the leniency policy of the HCA, as it provided evidence that was essential in revealing the infringement.

In another cartel case from the period since June 2009, the HCA – in a decision handed down on 24 September 2009 – established that the majority of the banks active in Hungary, and the two major payment card schemes Visa and MasterCard, infringed competition laws by setting up uniform multilateral interchange fees (MIFs). The commencement of this activity by the undertakings dated back to 1996 and it was operated in a more or less formalised form (the Bankcard Forum). The main reason for the establishment of a competition infringement was that the parties established the same MIFs for both payment card schemes, instead of a separated procedure. The decision of the HCA can be regarded as another item in the ongoing fight in the EU against the various means of restricting competition by banks through payment card schemes. Altogether, the imposed fines amounted to 968 million forints.

In the merger control field the fusion on the salami market requires special attention. The HCA approved – on the basis of the SIEC test – the merger between the groups of undertakings producing the two best-known salami brands, Pick and Herz, whose combined share of the salami market exceeded 50 per cent, and where the market share of their biggest competitor was below 10 per cent. By means of the merger in question Pick acquired the assets of Herz, the most important element of which was the 'Herz' trademark. In its decision the HCA took into account that Herz's financial status had been deteriorating and the company had been progressively losing market share since 2008, as well as the fact that it had shut down production and a forced liquidation procedure was in progress against it. Furthermore, competition pressure had increased on the relevant market as a result of the growing market shares of the self-branded products of retailers. As the HCA did not find it proven that the merger would significantly impede effective competition on the relevant market, it granted its authorisation for the transaction. The parties to the merger also relied on the 'failing firm defence', but they were unable to prove that there was no anti-competitive alternative purchase other than the notified merger, and therefore the HCA rejected this defence.

Abuse of dominance and abuse of buyer power

Section 21 of the Act states that the abuse of dominance is prohibited. Dominance has to exist on the relevant market as established on the basis of interchangeability or substitutability, both on the supply and demand sides, while the Act defines dominance in accordance with the ECJ definition in the *United Brands* case.

Abusive behaviour may either be anti-competitive or exploitative, similarly to the law regarding article 102 of the TFEU.

The law regarding section 21 of the Act, despite some minor and rather technical amendments effective from 1 November 2005, has not changed in substance, but this does not mean that there have been no statutory developments in this field of competition law.

The Hungarian legislature, in Act CLXIV of 2005 on Trade (the Trade Act), introduced a concept akin to abuse of dominance – the 'abuse of significant market power' – which in fact tries to catch an abuse of buyer power in certain cases, but by means of different and stand-alone legislation separate from the Act regarding abuse of dominance. The legislation on abuse of buyer power came into force on 1 June 2006.

The Trade Act prohibits the abuse of significant market power against suppliers. The Trade Act stipulates that the enforcement of the above prohibition falls within the competence of the HCA which, in its procedure, applies the Act's provisions as applied in abuse of dominance cases.

As the Trade Act created a similar but distinct system from the law regarding abuse of dominance, the HCA introduced a separate form for notifications based on the Trade Act, which must be used from 1 June 2006.

Merger control

The amendment of the Act as of 1 June, 2009, brought significant changes in the domestic merger regime by introducing the SIEC test to replace the dominance test as the substantive test in merger cases. However, most of the former rules remain applicable in their earlier effective form. The thresholds for a notifiable concentration remained unchanged by the amendment, that is, the aggregate annual turnover of the participating undertakings must exceed 15 billion forints. The maximum amount of the daily fine imposed for a failure to submit an application for authorisation was increased from 50,000 to 200,000 forints.

As a result of the introduction of the SIEC test, the Notice and the related Guidelines of the head of the HCA in relation to the differentiation of first and second-phase cases in merger control procedures had to be adapted to the new rules. The reissued Notice

provides a clear distinction now between one and two-phase investigations in merger cases under the new regime.

As a further result of the introduction of the SIEC test, on 17 May 2010 the HCA published on its website draft guidelines in connection with the application of the test and the method of analysis to be followed in the course of the assessment of the non-horizontal effects of mergers. The published material consists of the following four parts:

- methodology for the assessment of mergers;
- principles on the amount of detail and the quality requirements of data used for quantitative analysis by the HCA;
- most important aspects in defining the market concerned by the merger; and
- most important aspects to be taken into account during the assessment of the non-horizontal effects of mergers.

The documents are to be discussed within the framework of a consultation open to the public in July 2010. The aim of the published documents is a better understanding of the HCA's procedure in merger clearance cases, and they bear a close resemblance to the Commission Notice on the definition of relevant market for the purposes of Community competition law and the Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, but they are also based on Hungarian competition law practice and take into regard similar guidelines published by the Office of Fair Trading in the UK and the Competition Authority in France. These documents may be formalised as approved Guidelines in the future.

With an earlier amendment of the Act, the possibility to undertake commitments was introduced. For the public to obtain more clarity regarding the HCA's standpoint on available remedies in merger cases, the HCA issued a notice thereon explaining the nature of the remedies, their applicability and implementation.

According to the Notice on remedies, the HCA will always take into account the Act as a statutory background, but it will leave the door open for the adoption of methods applied by other competition law enforcers – for example, the concept of a divestiture trustee is expressly indicated in this regard despite the fact that trusts are not recognised under Hungarian civil law.

According to the Notice, remedies may entail either conditions (precedent or subsequent) or undertakings (commitments) regardless of the fact that, in their effects, these remedies do not differ significantly. In the case of a condition precedent, the HCA's approval will not come into effect until the condition is met, whereas in the case of a subsequent condition subsequent, the approval will lose its effect in case the condition is not met. In the case of a commitment, if it is not carried out, the HCA may withdraw it. As far as the application of the various remedies is concerned, the HCA is likely to apply commitments if they relate to behaviour that should be implemented on a long-term basis, whereas a condition precedent is likely to be applied if there are serious doubts as to the feasibility of the condition precedent. In addition, the following principles will be applicable in the course of determining the most suitable remedy in the given case: the remedy has to be capable of solving the competition concern; the HCA is bound by the undertakings of the applicants; the condition must be effective, executable and monitorable; and the applicant has to cooperate with the HCA in implementing the remedy.

Remedies may be either structural or behavioural, but the HCA will strive to apply structural remedies (eg, divestiture) rather than behavioural remedies (eg, provision of access to an essential facility). The subject matter of any divestiture should be a separate and viable economic unit, and the purchaser thereof must be able to operate it, ie, there has to be a viable purchaser. Divestitures should be completed within six months, unless special circumstances justify a longer period.

Public enforcement

In May 2007 the HCA, to provide more clarity on the public enforcement of competition law, issued its General Policy Guidelines regarding its role and operations, which are to serve the purpose of providing a general conceptual framework for the HCA's operations. The most important messages of these Guidelines are as follows:

- the HCA will operate and apply the provisions of the Act within the framework of general principles in each field of its activity, such as the enforcement of the Act as a governmental authority, the promotion of competition and the promotion of a competition culture; and
- in relation to the HCA's enforcement activities, the following principles will be applied:
  - the most important aim of the HCA as a public enforcement authority is to increase long-term consumer welfare by increasing efficiencies, and when applying EC law, the integration of Europe;
  - when the HCA is balancing the benefits and detriments of market behaviour, 'detriments' will be interpreted as the restriction of competition, whereas 'benefits' means efficiencies, and although the aggregate of the efficiencies may counterbalance the detriments, it is unlikely that in the case of hard-core cartels this will happen;
  - in the course of the HCA's market reviews, a dynamic approach will be applied, ie, the possibility of market entry and import threats will be taken into account as well as that of innovation;
  - the HCA will interfere with the operation of the markets to the least extent possible; if there are doubts that market behaviour is pro or anti-competitive, the HCA will vote for pro-competitiveness (except in cases involving monopoly or 'starting' markets, ie, where a state monopoly was recently abolished);
  - the HCA will apply both behavioural and structural remedies; however, structural remedies will be preferred (see, for example, the Notice on remedies above);
  - the HCA will strive to apply economics to the greatest extent possible in the course of making its decisions, and will also attempt to apply empirical methods and international competition practice; and
  - as far as the allocation of the HCA's resources is concerned, the HCA acknowledges that private enforcement is already available regarding cartel and abuse of dominance cases, therefore it wishes to concentrate and focus its resources on cases that are important from the public's perspective (eg, because of the effects on the relevant market, the effect on the development of competition law, etc).

Private enforcement

The purpose of a cartel is often the manipulation of either purchase or sale prices, which can cause damage to the clients of the cartel's participants. Due to the nature of cartels it is very difficult to prove the extent of such damage. Before 1 June 2009, legal and natural persons that suffered damage in connection with hard-core cartels were only able to initiate civil law proceedings on the basis of the general civil law regulations. As of the com-

mencement of the recent amendment (1 June 2009), the Act contains provisions applicable in such a case. The new rules set up a rebuttable presumption according to which it is presumed that the hard-core cartel had an effect of 10 per cent on the price and 10 per cent of the price will be awarded by the court as lump sum damages, and the claimant will only have to prove its damage exceeding this lump sum amount.

The participants in a cartel will bear joint and several liability in a private civil law procedure initiated against them by legal or natural persons suffering damage as a result of the cartel. Until the recent amendment of the Act, any participant in the cartel that was exempted from sanctions under the leniency rules shared the position of other participants in a civil law procedure and the judgment was executable against it in the same way, that is, the entire amount of damages awarded by the court was enforceable. The new private enforcement rules provide that the judgment will be executable against such an exempted participant in the cartel only if enforcement was unsuccessful against the other participants.

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Szabó Kelemen & Partners Attorneys is a full-service law firm that traces its origins back to Szabó & Partners Attorneys, which was established in 1996. The firm is the Hungarian member of the International Alliance of Law Firms, and was the Hungarian member of the Ernst & Young Law Alliance from 1996 to 2003. The firm's impressive client base consists of multinationals and large and medium-sized Hungarian companies.

The firm is particularly strong in competition, employment, tax and corporate and commercial work, including corporate restructuring and insolvency, as well as in various industry sectors, including financial services and real estate. Many of the firm's Hungarian lawyers have worked in law offices or barristers' chambers abroad, and many hold postgraduate qualifications from foreign institutions. The working languages of the firm are Hungarian, English and German.

The firm's core practice areas are:

- antitrust/competition law;
- banking and securities;
- corporate and commercial, including company group financing and royalty payment structures;
- corporate restructuring and insolvency;
- employment;
- insurance;
- litigation and arbitration;
- mergers and acquisitions;
- public procurement;
- real estate/commercial property; and
- tax.

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László Kelemen leads the antitrust/competition law practice group of Szabó Kelemen & Partners Attorneys. He regularly represents international and domestic firms before the Hungarian Competition Authority, and has advised clients on a diverse range of matters, including abuse of a dominant position, cartels, distribution and merger clearance. He also maintained the Hungarian desk of Ernst & Young LLP in New York in 1999 and 2000, where he focused on investment and tax-related issues.

In addition to his Juris Doctorate (1995) from Eötvös Loránd University, Budapest, he holds a postgraduate diploma in EC competition law (2000) from King's College, London, and a diploma in international business law (1998) from TMC Asser Instituut, Asser College Europe, The Hague. László speaks Hungarian and English.

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Geoff Bennett has worked with Szabó Kelemen & Partners Attorneys in Budapest since 1997, and regularly advises on competition law matters, including merger clearance and the avoidance of anti-competitive behaviour. He was admitted to practise as a solicitor of the Supreme Court of Queensland, Australia, in 1994, and is registered with the Budapest Bar Association as a foreign legal adviser.

Geoff holds a Bachelor of Laws degree (1992) from the University of Queensland, Australia, as well as a postgraduate diploma in EC competition law (1999) from King's College, London.

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Gergely Prinz joined Szabó Kelemen & Partners Attorneys as a legal trainee in 2007, and focuses on large-scale commercial developments and financial services, as well as the competition law aspects of these and other areas.

In addition to his Juris Doctorate (2006) from Pázmány Péter Catholic University, Budapest, he pursued studies in European and public procurement law at the Universitetet i Bergen, Norway. Gergely speaks Hungarian and English and has a good understanding of French.


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